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No. 75-579

In the Supreme Court of the United States

OCTOBER TERM 1975

ANTHONY ESPOSITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Anthony Esposito, defendant-appellant in the court below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Opinion Below

The opinion of the Seventh Circuit, not yet officially reported, is set forth in Appendix 1. (App. 1-23.) The opinion and order of the District Court entered on July 12, 1974 is attached as Appendix 2. (App. 24-28.) Pertinent portions of the sentencing hearing on September 16, 1974 are attached as Appendix 3.

Jurisdiction

The opinion and judgment of the Court of Appeals for the Seventh Circuit were entered on August 18, 1975. A timely petition for rehearing was denied on September 16, 1975 and the judgment became final on that date. The Court's orders of August 18 and September 16, 1975 are attached hereto as Appendices 4 and 5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The chief government witness against defendant, Charles Crimaldi, postured before the jury as a citizen who had avoided crime and led a law abiding life since he was convicted as a youth many years before this trial. The prosecutors and government agents took the position throughout the trial that Crimaldi was, to their knowledge, a working man with no criminal associations or motive to implicate defendant unfairly. Unbeknownst to defense counsel—but known to the prosecutors and agents—Crimaldi had been engaged in numerous criminal activities during his entire adult life, and had repeatedly and recently been involved in organized and violent but unprosecuted crimes. The prosecutors did not disclose to defense counsel what they knew of Crimaldi's sordid past, and he was presented to the jury in testimony and argument as a long-time solid citizen.

The Court of Appeals held the prosecutors had violated defendant's rights under the Due Process Clause and the Jencks Act, but held the "error" to be harmless.

These facts give rise to the following issues:

1. Does the Court of Appeals' decision conflict with this Court's ruling in *Davis* v. *Alaska,* 415 U.S. 308 (1974), that deprivation of the right of effective cross examination automatically requires a new trial, irrespective of the alleged "harmlessness" of the violation?

2. Does the Court of Appeals' ruling conflict with the holding of this Court in *Chapman* v. *California*, 386 U.S. 18 (1967), and other federal reviewing courts as to the test to be applied in determining whether a new trial should be granted when the defendant's constitutional rights have been violated before or during the trial?

3. Was the government's conduct so flagrant as to call for exercise of this Court's supervisory powers?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes and court rules involved herein are the Fifth and Sixth Amendments to the United States Constitution, the Jencks Act (18 U.S.C. § 3500) and Rule 2.04 of the Criminal Rules of the United States District Court for the Northern District of Illinois. The texts of the pertinent provisions are reproduced as Appendix 6.

STATEMENT OF THE CASE

On February 25, 1972 a jury found Anthony Esposito guilty of (i) possessing and (ii) distributing 206.5 milligrams of cocaine on June 24, 1971, in violation of 21 U.S.C. § 841. The principal prosecution witness at trial was Charles Crimaldi, a government informer who testified that he had contacted Esposito seeking to purchase cocaine and who claimed to have received a cocaine sample from Esposito on the date in question. The remainder of the government witnesses were special agents of the Bureau of Narcotics and Dangerous Drugs (BNDD) who testified to having conducted surreptitious surveillance of certain of the meetings and conversations between Esposito and Crimaldi. The defendant took the stand on his own behalf, admitted that he had been approached by

Crimaldi, a childhood friend, who was seeking to purchase narcotics, but denied that he had agreed to sell narcotics to Crimaldi and denied that he passed a cocaine sample.

At trial, the prosecution, both in argument and through the testimony of Crimaldi, had led the jury to believe that Crimaldi was a man who had been convicted of armed robbery and burglary at age 17 (in 1950 and 1951) but who had led a law abiding life ever since and who had no motive to lie (Tr. 20, 174-176, 369-370); the prosecution disclosed nothing of Crimaldi's sordid life of crime to the defense or the jury, other than his two youthful convictions. (H. 135-138)*

The defense, in an effort to discredit Crimaldi and to lend credence to defendant's testimony that he had reason to fear Crimaldi and his associates, asked Crimaldi on cross-examination whether it was true that he had been a juice loan enforcer. Crimaldi successfully avoided giving a direct response to the question. (Tr. 105-7) When the same question was addressed to BNDD Agent Haight on cross-examination, Agent Haight testified, contrary to fact, that he was unaware of Crimaldi's juice loan activities.** (Tr. 174-176)

At the conclusion of the trial the District Court arrested judgment on the ground that the prosecution had failed to show a "nexus" with interstate commerce. The gov-

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* References to the record herein are as follows: "Tr. ....." refers to the Transcript of Esposito's trial; "H. ....." refers to the May 21-22, 1974 hearings on Esposito's Motion for New Trial; and "N.T. Ex. ....." refers to the three volume Exhibit to that Motion filed on February 25, 1974.

** During the 1974 hearings on the motion for new trial based on newly discovered evidence, Agent Haight conceded that his trial testimony on the subject was "a little bit in error." (H. 118)

ernment appealed; the Seventh Circuit reversed, *United States* v. *Esposito*, 492 F.2d 6 (7th Cir. 1973), *cert. denied* 414 U.S. 1135 (1974), holding that no such "nexus" need be shown. The merits were not considered on that appeal.

During the pendency of the government's appeal, several of the government witnesses—including Crimaldi, the linchpin of the government's case—testified in other proceedings in a manner violently at odds with their testimony in Esposito's trial. Most significantly, Crimaldi, in an unrelated state court proceeding, testified as a prosecution witness that he had committed murders, conspiracy to murder, battery, hijackings, loan sharking and perjury—all crimes for which he had never been prosecuted; he also admitted in a series of newspaper interviews to having been a professional criminal since age 17 and to having committed murders, armed robberies, burglaries, hijackings, bank robbery, kidnapping, bribery and a number of other crimes. (N.T. Ex. 620-1, 642-7, 651, 656-67, 675, 698, 708-30, 738, 749, 867, 888-94, 936, 938, 951, 973-4, 1133-1167.) These disclosures, coming as they did, to the attention of the defense for the first time *after* the Esposito trial, were the bases of a motion for new trial based on newly discovered evidence.

The hearing on defendant's motion for a new trial revealed that the government's tactic of whitewashing Crimaldi before the jury was not an inadvertent oversight. The prosecution team in the Esposito case had been aware *prior to trial* that Crimaldi had confessed to an appalling catalogue of crimes for which he was never prosecuted. In fact, even prior to the events in issue in this case, Crimaldi had given a four hour tape recorded debriefing to BNDD agents in which he admitted to having engaged in violence as a juice loan enforcer, that he was a robber and a burglar, that he had kidnapped a forest preserve ranger and that he had been involved in bribing police officers

and judges.* (H. 45, 57, 59-70) The government attorney who had participated in the pre-trial discovery phases of the case had listened to the tape recording, had consulted with the debriefing agents prior to trial concerning Crimaldi and his life of crime and had interviewed Crimaldi himself on the subject. (H. 15-18, 20, 28, 76, 112-113, 119-120) The prosecutor who tried the case was briefed by the BNDD concerning the contents of the tape recorded interview of Crimaldi *for the express purpose of being advised of facts which might be brought out on Crimaldi's direct or cross-examination.* (H. 71, 76-79) The very BNDD agents who had obtained the confessions from Crimaldi sat at the prosecution table throughout the trial. *Yet, not a single government attorney or agent disclosed to defendant or his attorney that Charles Crimaldi had confessed to a great many heinous crimes for which he was never prosecuted.*

In fact, the very government agent who less than a year before had conducted a debriefing of Crimaldi on the subject of his juice loan activities, and who immediately before trial had listened to the tape-recorded debriefing, testified under oath at the Esposito trial that he was not aware that Crimaldi had been engaged in *any* illegal activities. (Tr. 174-176; H. 113-120; H. Ex. 1L-1N) The prosecutor compounded the non-disclosure of the impeach-

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* The tape recording is, so far as we know, the fullest summary of Crimaldi's confessed life of unprosecuted crime available to the government before trial. Defense counsel have never been permitted access to the tape or a transcript thereof. The hearings on the motion for new trial also disclosed that the government attorneys and agents prosecuting Esposito had interviewed Crimaldi on other occasions prior to trial concerning his criminal activities. At a minimum, Crimaldi had admitted to the crimes of bribery, hijacking, kidnapping, robbery, burglary, assault, extortion as a juice loan enforcer and conspiracy to murder. (H. 37, 39, 41-2, 52-3, 56-7, 119-120).

ing material concerning Crimaldi by arguing to the jury that Crimaldi had been in jail twenty years before but that there was no charge pending against him now, and that any notion that he was testifying on behalf of the government to get out of his own difficulties was "worthless." (Tr. 369-370.)

The District Court in denying the motion for new trial found that "the government is not blameless in this matter" (App. 28) but held that "it is difficult to believe that the outcome of the trial would have been different if the defendant had been given the tape." (App. 27) The Court was, however, by no means sure of its conclusions in rejecting the new trial motion. As it explained when sentencing Esposito (App. 29):

> "I do not like to put people to the expense of taking an appeal, but I certainly would not try to discourage the defendant from taking one in this case. I think there is a very serious question involved in the prosecutor's actions in this case, as I pointed out in my decision.
>
> "I have even given some thought to changing that decision and letting the Government take the appeal. But I have decided to stand on the decision."

The Court of Appeals, in affirming the conviction, treated the failure to disclose the damning information concerning Crimaldi to defense counsel as a violation of both the Jencks Act (18 U.S.C. § 3500) and the mandate of *Brady* v. *Maryland,* 373 U.S. 83 (1963), but held that the error was "harmless," because in its judgment the Crimaldi admissions "would not have affected the jury's assessment of Crimaldi's credibility" and thus "would not have produced a reasonable doubt in the eyes of the

jury." (App. 15-16) Circuit Judge Swygert in a concurring opinion found that "the Government's thoughtless, cavalier conduct in this case comes to the very brink of requiring reversal", but agreed with the harmless error holding because of his belief that "Crimaldi's credibility was not a crucial factor." (App. 22)

The majority opinion below was predicated, apparently, upon its conclusion that the prosecutor's "failure to reveal the tape was in good faith." (App. 12) That conclusion, even if correct (which we deny—the District Court had pointed out that the existence of the tape "was known to the prosecutors before trial", App. 25), missed the point. It is the *impeaching information* contained in the tape and elsewhere—not the tape recording itself—which is significant. The record is clear that the prosecutors *deliberately* failed to disclose the *impeaching information* to the defense.

REASONS FOR GRANTING THE WRIT

This is a case of first impression on the standard to be applied in determining whether the defendant is entitled to a new trial when the government's deliberate non-disclosure of material evidence deprives him of *both* his Fifth Amendment right to due process and his Sixth Amendment right to confrontation and cross-examination. By deliberately keeping from defense counsel Crimaldi's confessions of a life of unprosecuted crime, the government did more than deny defendant his Fifth Amendment right to due process of law. *Giglio* v. *United States,* 405 U.S. 150, 154 (1972); *DeMarco* v. *United States,* 415 U.S. 449, 450 (1974); *Napue* v. *Illinois,* 360 U.S. 264, 272 (1959); *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963). It also denied him his Sixth Amendment right of confrontation and effective cross-examination. *Davis* v. *Alaska,* 415 U.S. 308, 318 (1974). In *Giglio,* this Court suggested that a new trial is required if the undisclosed evidence "could . . . in any reasonable likelihood have affected the judgment of the jury" (405 U.S. at 154; whereas in *Davis* the Court held that denial of effective cross-examination is " 'constitutional error of the fact magnitude and *no amount of showing of want of prejudice would cure it.*" (415 U.S. at 318) (Emphasis added)

This case is also important for at least three other reasons:

(1) This case represents a significant split between the Seventh Circuit and the opinions of other Courts of Appeal over the standards to be applied when a federal court is confronted with the government's deliberate withholding of impeaching evidence.

(2) The Court of Appeals' opinion adopts a constitutional "harmless error" test which is much less stringent

and at odds with the applicable decisions of this Court, notably *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

(3) The prosecutor's gamesmanship aimed at obtaining a conviction in this case, which has now been sanctioned by the Court of Appeals, is such a radical departure from the standards of fairness and requirements of disclosure mandated by this Court and the Federal Rules of Criminal Procedure as to call for the exercise of this Court's supervisory powers.

I.

THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN DAVIS v. ALASKA.

If the prosecution had disclosed to defense counsel during trial that its principal witness had confessed to being a juice loan enforcer, kidnapper, hijacker, robber, burglar, briber, and perjurer, but had not been prosecuted for those crimes, the defense would undoubtedly have used that information as the capstone of its cross-examination of Crimaldi. The information would have served not only to discredit Crimaldi's general credibility, it would have shown Crimaldi's bias and motivation to aid the government in order to avoid prosecution himself for his litany of confessed crimes. It would also have shown Crimaldi to be a man fully capable of "planting" the cocaine sample himself in an effort to implicate the defendant. Finally, it might well have shown that Crimaldi had a personal bias against the defendant.*

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* Although we have not been permitted to see the transcript of the tape-recorded interview, the District Court's description of that interview states in pertinent part (App. 26):

> "The defendant is mentioned in the transcript on a few occasions but not in an exculpatory manner."

In all events, the deliberate failure of the prosecution to make this information known denied the defense the opportunity to bring it to the jury's attention. This Court has explicitly held that to deprive defense counsel of the opportunity "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness" is a denial of the Sixth Amendment "right of effective cross-examination." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974).

The court below, while conceding the impeaching character of the withheld evidence, found that the jury was "obviously" already suspicious of Crimaldi's credibility (App. 15) and that the additional information would probably not have affected the jury's assessment of his truthfulness. That holding is in direct conflict with this Court's ruling in *Davis* that denial of the right of effective cross-examination is (415 U.S. at 318) " ' "constitutional error of the first magnitude and *no amount of showing of want of prejudice would cure it.*" *Brookhart* v. *Janis*, 384 U.S. 1, 3.' *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968)." (Emphasis added)

If, as we believe is evident, the defendant was denied his Sixth Amendment right to effectively cross-examine his principal accuser, then affirmance of the conviction based upon surmise that defendant was not prejudiced is directly opposed to this Court's recent holding in *Davis*.

II.

THE DECISION BELOW IS IN CONFLICT WITH THE CONSTITUTIONAL HARMLESS ERROR TEST MANDATED BY THIS COURT

Assuming *arguendo* that a harmless error test may properly be invoked in a case such as this, the formulation of

the test applied by the court below is at odds with the decisions of this Court concerning "harmless error."

The government conceded on appeal that the information should have been disclosed, and the court below assumed that the government's failure to disclose the Crimaldi confession violated not only the Jencks Act (18 U.S.C. § 3500) but also the mandate of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Thus, the Court of Appeals assumed that defendant's federal constitutional and statutory rights were violated at trial.

However, in holding that the error was harmless, the court below speculated as to whether the impeachment would "have affected the jury's assessment of Crimaldi's credibility."* (App. 15), and based upon the opinion that the jury's credibility assessment would not have been affected, the court concluded that "it would not have produced a reasonable doubt in the eyes of the jury." (App. 15-16)

That is not the test. This Court has declared that ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). In view of the trial judge's indecision on whether a new trial would be justified (App. 29) and Circuit Judge Swygert's opinion that the case came to the "brink of reversal" (App. 22), it is clear that the error was not harmless beyond a reasonable doubt.

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* We believe it is improper for an appellate tribunal to even engage in such speculation, cf. *Davis* v. *Alaska*, 415 U.S. 308, 317 (1974), let alone base its decision on the results of that surmise.

III.

THE DECISION BELOW CONFLICTS WITH THE STANDARDS ADOPTED BY OTHER COURTS OF APPEALS TO BE APPLIED IN DETERMINING WHETHER NON-DISCLOSURE OF IMPEACHING EVIDENCE BY THE GOVERNMENT REQUIRES A NEW TRIAL

In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), this Court held that "suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In the present case, the court below has held that where the suppressed evidence has "impeachment value only" defendant is entitled to a new trial only if "its revelation would . . . have produced a reasonable doubt in the eyes of the jury." (App. 15-16) That standard is much less favorable to the aggrieved defendant than the tests prescribed by other Courts of Appeal to be applied to cases which concern suppression of impeaching evidence by the government.

The Fifth Circuit has taken the position that a new trial should be awarded if the undisclosed evidence concerning the principal prosecution witness "would have afforded useful cross-examination." *United States* v. *Deutsch*, 475 F.2d 55, 58 (5th Cir. 1973). That test is clearly met in the present case.

The Second Circuit has developed a more complex standard, which depends upon the culpability of the government in failing to disclose the evidence. *United States* v. *Morell*, —— F.2d ——, 17 Cr.L. 2521 (2d Cir. 1975). In the case of *deliberate* suppression, the defendant is entitled to a new trial when the evidence is material *or* favorable to the defense, and in such a case, materiality is to be judged not

(as was done in the court below) by its predicted effect on the jury verdict, but rather by the effect of suppression on the defense preparation for and conduct of the trial. *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir. 1973), cert. denied 411 U.S. 982. In the case of *negligent* non-disclosure, the Second Circuit awards a new trial if there was a significant chance that the added item, developed by skilled counsel, "could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *United States* v. *Pacelli*, 491 F.2d 1108, 1119 (2d Cir. 1974), cert. denied 419 U.S. 826; *United States* v. *Miller*, 411 F.2d 825, 832-3 (2d Cir. 1969).*

In trying to assess the impact that revelation of Crimaldi's life of crime would have had on the jury, the court below considered it significant that Crimaldi had been impeached in other ways (App. 14). The Second Circuit has specifically held that even when the defense possesses and exploits an "abundance of impeaching material" a new trial should be awarded where the government fails to disclose other "forceful impeaching material bearing on the credibility of the government's key witness." *United States* v. *Pacelli*, 491 F.2d 1108, 1119 (2d Cir. 1974), cert. denied 419 U.S. 826; *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975).

We submit that these conflicting views on such an important and recurring question as the standard to be applied to cases of governmental non-disclosure of impeaching evidence compel prompt resolution by this Court.

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* The essential difference between the Second Circuit's negligent non-disclosure test and that adopted by the Court below is that the Second Circuit would award a new trial if revelation of the evidence would produce a significant chance of a hung jury, *United States* v. *Miller*, 411 F.2d 825, 832 n. 14 (2d Cir. 1969), whereas the Seventh Circuit requires a showing that the new evidence would result in acquittal.

BLEED THROUGH

IV.

THE CONDUCT OF THE GOVERNMENT IN THIS CASE WAS SO FLAGRANT THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS AND AWARD A NEW TRIAL

Both the District Court and Judge Swygert in his concurring opinion in the Court of Appeals, expressed dismay at the tactics of the government in this case. The trial judge in his opinion found that the government was not "blameless" (App. 28), and later expressed the view that there was "a very serious question in the prosecutor's actions in this case" so that he had considered granting a new trial. (App. 29) Judge Swygert wrote that the government's "cavalier conduct" brought the case to the "very brink" of reversal. (App. 22) Yet both courts let the conviction stand.

Trial by trick is not the American way of doing things; however, that is what has been sanctioned here. Every member of the prosecution team, from the lawyer who participated in the pre-trial discovery phase to the trial lawyer, as well as the BNDD agents who testified on behalf of the government and who were seated at counsel table throughout the trial, was aware that Crimaldi was a professional criminal and that he had confessed to a horrible litany of crimes for which he was never prosecuted.

Yet they chose not to share this information with the defense. In fact, when Crimaldi testified that he had been convicted of two crimes while a youth but falsely pretended that for the past 15 years he had been employed as an honest plumber, the government sat silent. When defense counsel attempted to cross-examine Crimaldi on whether he had been a juice loan enforcer, Crimaldi dis-

ingenuously avoided answering the question, and the government sat silent. When Agent Haight untruthfully denied on cross-examination that he was aware of Crimaldi's juice loan activities, the prosecutors sat silent.

When it came time to argue the case to the jury, the prosecutor painted Crimaldi as a reformed youthful offender who had for a number of years been an honest plumber, who was subject to no current charges, and who had no motive other than disinterested altruism for testifying against defendant, his childhood friend.

We know that there is no litmus paper test to determine whether disclosure of the whole truth may have changed the jury's verdict. We cannot show objectively that it would have, and the government cannot show that it would not have, because the prosecutors decided not to disclose the explosive information they had about Crimaldi, because Crimaldi was not candid, and because the agents lied concerning their knowledge of Crimaldi.

We believe that if the truth about Crimaldi had come out, there is a great likelihood that the jury would have believed Esposito and not Crimaldi. Surely, the facts would have afforded defense counsel powerful additional arguments, and the jury would have had a far different record to consider in its deliberations—a record which weighed much more heavily in the defendant's favor than that which the jury had before it.

This Court has in the past reversed convictions for prosecutorial derelictions under facts far less compelling than those presented here. We submit that this is an appropriate case for exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit in this case.

Respectfully submitted,

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October 16, 1975.

APPENDIX

APPENDIX 1

In the United States Court of Appeals For the Seventh Circuit

No. 74-1770

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY ESPOSITO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 980

THOMAS R. MCMILLEN, *Judge.*

Argued March 31, 1975 — Decided August 18, 1975

Before SWYGERT, CUMMINGS, and SPRECHER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Defendant was charged in a two-count indictment with the possession and distribution of 206.5 mg. of cocaine in violation of 21 U.S.C. § 841. After a jury trial, he was found guilty on both counts. Thereafter, the district court granted his motion for arrest of judgment on the ground that Congress had no

power to regulate the use and distribution of cocaine without requiring proof in each prosecution of some connection with interstate commerce. We reversed and remanded the cause for entry of judgment on the verdict, 492 F.2d 6 (7th Cir. 1973), certiorari denied, 414 U.S. 1135. Defendant was then sentenced to two-year terms of incarceration plus statutory special parole terms of three years, to run concurrently on each count.

At the February 1972 trial, the Government's chief witness, Charles Crimaldi, testified that on June 22, 1971, defendant telephoned to invite him to breakfast at the Hyatt Regency O'Hare Hotel in Rosemont, a Chicago suburb, on June 23. Crimaldi accepted and then contacted Special Agent David Haight of the Bureau of Narcotics and Dangerous Drugs ("Bureau").[1]

The testimony at trial further shows that on the morning of June 23rd, Crimaldi met with Haight and Special Agent Edward Nolan at the Howard Johnson Motor Lodge near the Hyatt Regency O'Hare. The agents searched Crimaldi and his automobile and placed a kel-set transmitter on him. Afterwards Crimaldi proceeded to the Hyatt Regency O'Hare where he joined Esposito in the coffee shop at 9:30 a.m.

The breakfast meeting was monitored on the kel-set by Agent Nolan. Although an attempt to record the conversation on tape proved unsuccessful, Agent Nolan's account of the conversation was substantially the same as Crimaldi's. Crimaldi told defendant that he was interested in buying some drugs and understood that Esposito might know of a source. Defendant replied that he used to have a source but did not know whether it was still

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[1] This agency is now called the Drug Enforcement Administration.

active. He agreed to find out whether the source was operative and asked Crimaldi about quantities. Crimaldi said that he wanted 2 kilos of cocaine per week. Esposito replied that amount "would be good but we couldn't meet every week, it would have to be a once-a-month drop on it, because if we met every week, [we] would be taking too many chances of getting arrested." Esposito left the table for a few minutes and upon his return stated that "The party wasn't in and he had left a phone number to have the party get in touch with him." After breakfasting, both men left the hotel through separate exits.

Crimaldi returned to the Bureau's office with Haight and Nolan. He received a message there to call his home. When he did so, he was given a number for contacting Esposito. He called the number and Esposito said, "Listen, I have to see you." They arranged to meet at the same coffee shop at four o'colck. A recording of this telephone conversation was played to the jury. Before the meeting, Crimaldi was again fitted with a transmitter and he and his car were searched by Haight and Nolan. On this occasion, no agent testified that he heard the conversation over the kel-set.

Before the afternoon meeting, Special Agent Frank Cruz began surveillance of defendant from the third floor balcony of the Hyatt Regency O'Hare. He saw Crimaldi come into the coffee shop-lounge area on the second level and approach Esposito. Cruz witnessed Esposito's attempt to place a Parliament cigarette package in Crimaldi's shirt pocket. This attempt failed, apparently because Crimaldi's own cigarettes were in that pocket. Defendant then placed the package in Crimaldi's left jacket pocket. Crimaldi testified that Esposito told him that the package contained a sample of the cocaine.

Defendant and Crimaldi proceeded to the rooftop lounge of the Hyatt Regency O'Hare for a drink. Defendant explained that he had contacted his source who had 25 ounces of cocaine, with only 5 ounces committed to another. Defendant said he could obtain 20 ounces of cocaine at $750 an ounce for Crimaldi. The latter remonstrated about the high price and told defendant to call him at home that evening for an answer about the proposed sale.

Crimaldi then drove to the nearby Howard Johnson Motor Lodge and gave to Agent Haight the cigarette package which Esposito had delivered to Crimaldi. He and his car were searched a third time. Enclosed in the package was a piece of tinfoil containing a glassine packet with 206.5 mg. of cocaine, the amount mentioned in the indictment. Agent Haight testified that Crimaldi smoked Parliaments and that, during the search prior to the meeting where the sample was delivered, the package of Parliaments then on his person was searched by Agent Nolan. Haight also testified that Crimaldi had his original package of cigarettes at the search after the delivery in addition to the one containing the cocaine, and that the package containing the cocaine was a "soft pack," while Crimaldi's own cigarettes were in a "hard pack."

At 11:00 p.m. that night, defendant phoned Crimaldi and arranged to meet him the next afternoon. A tape of this call was also played for the jury. Crimaldi asked, "That's 20—what we talked about?" Defendant responded in the affirmative and said, "I will call him right now." Five minutes later, defendant again telephoned Crimaldi and asked if he wanted "the five." Crimaldi told defendant that because of defendant's prior advice that he had somebody else for the other five, he had "backed off" as to it. However, Crimaldi told defendant

that he would take "two [referring to the 20 ounces] for sure" and would let defendant know at their meeting on the next day "about the other five."

On the next afternoon, Crimaldi returned to the Regency Hyatt O'Hare. Bureau Agent Haight saw Esposito driving through the parking lot, but he failed to meet Crimaldi. That evening Esposito telephoned Crimaldi and explained that it got so "hot" at the parking lot, referring to the Bureau agents there, that he had returned to his home.[2] Later, defendant telephoned Crimaldi to say that things were getting complicated and that he was sorry he was unable to help him. Tapes of these conversations were also played for the jury.

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[2] After noting that the "heat" in the parking lot, Esposito told Crimaldi that "it was beating down so hard, I am surprised that you weren't warm." The dialog, with Crimaldi speaking first, included the following:

> "Are you sure it [the 'heat'] was for us or something else?"
>
> "Well, they were very interested in coming around a couple of times and down the block and around the block. Definitely. How is your phone?"
>
> "Good, real good. It is—over here we have got underground cables."
>
> "Well, all right. They picked me up when I pulled in. I came around twice and come in and jumped in and out and come down the block and stopped with me and went around again and stopped with me again and wait there for the car. So, if it ain't your end it is the other end."
>
> "It's gotta because nothing came after me, you know."
>
> "They didn't come after me. They were waiting."

On cross-examination Esposito admitted that the recording was a conversation between Crimaldi and himself, but said that the "double talk" about "heat" etc. was because Crimaldi did not want his wife "to know what was going on in his dealings."

Three witness testified for the defense. Two were called to impeach Crimaldi's testimony. Defendant's brother Frank testified that Crimaldi was a heroin addict and had given Frank heroin in the past. Edward Brabec, a Chicago Journeymen Plumbers Union official, testified that Crimaldi had been expelled from the union for non-payment of dues. An objection to Brabec's testimony was sustained on the grounds that it failed to impeach anything which Crimaldi had said on the witness stand. On cross-examination, Brabec acknowledged that Crimaldi's expulsion from the union for non-payment of dues did not mean that he would have been unable to work as a plumber in the years in which he had said that he had so worked. Furthermore, Brabec stated that under the practices of his union a non-member could work out of the union's hiring hall and that the records which he had with him pursuant to a subpoena would not show whether Crimaldi had worked as a plumber after his expulsion from the union.

Defendant also testified and gave a different version of the June 23 events. According to defendant, Crimaldi solicited the meeting in order to borrow money. Crimaldi also asked defendant whether he could provide Crimaldi with heroin, and Esposito admitted replying, "Yes, maybe I can." Defendant denied that the subject of heroin came up thereafter and denied that cocaine was ever mentioned. According to defendant, at the afternoon meeting on June 23, Crimaldi requested $2,000 from Esposito's union because of juice loan obligations. Defendant replied that instead he would try to obtain personal funds for Crimaldi. Defendant denied that he gave Crimaldi any cocaine that afternoon.

Government's Non-Disclosure of Additional Impeachment Material About Crimaldi

On May 25 and 27, 1974, Bureau Agents Boerner, Braseth and Safir taped an interview with government informer Crimaldi in Washington, D.C. The existence of this tape was not disclosed to defense counsel prior to or at the trial. On the day before the hearing on the third motion for a new trial, the prosecutor who tried the case notified defense counsel that he had discovered the taped interview.

After the May 1974 hearing on that motion for a new trial, Judge McMillen examined *in camera* the 131-page transcript of the Crimaldi taped interview before filing an order denying a new trial. In the order he pointed out that "the government does not deny that the tape was made by him [Crimaldi] and that its existence was known to [the initial prosecutor Peter Vaira, who was in the case only until the indictment was returned, but not to J. Michael Fitzsimmons who tried the case[3]] before trial." However, the court concluded that failure to show the tape to defense counsel or to submit it to the court *in camera* was not ground for setting aside the jury's verdict of guilty. The court described the tape as follows:

> "The tape contains much irrelevant and confidential information about criminal activities of persons other than Crimaldi. It does not impeach his trial testimony. It does confirm the defendant's information that Crimaldi was involved in collecting for a juice loan racketeer and that he has admitted to various

[3] Fitzsimmons stated at the new trial hearing that he had no knowledge of the tape. This is not directly refuted elsewhere in the transcript of that hearing and the district court apparently credited Fitzsimmons' account.

> illegal acts in this occupation as well as to other illegal acts, some similar to those for which he had previously been convicted and some not. He does not admit * * * to any activities involving narcotics."

We have also examined the transcript of the tape and a summary of the highlights thereof and largely agree with the district court's description of its contents. It contains no evidence tending to exculpate the defendant. Since the statement was made before the transaction charged in this case, its only value to defendant was in possibly impeaching Crimaldi.

The district court's opinion was based on four grounds:

1. Information revealed in the transcript was only collaterally relevant to Crimaldi's testimony and does not exculpate defendant. Therefore, according to the court below, the only conceivable use the defense could have made of the tape would have been in cross-examining Crimaldi about his reputation and criminal activities. In the absence of perjury, this type of material need not be disclosed under *Brady* v. *Maryland*, 373 U.S. 83; *Napue* v. *Illinois*, 360 U.S. 264; *Giglio* v. *United States*, 405 U.S. 150.

2. Most of the matters discussed by Crimaldi in the interview concerned his association with Sam de Stefano in the juice loan business. Although defendant and his counsel knew of this activity of Crimaldi, defense counsel did not exhaust the inquiry at the trial as "a mater of trial stategy which was knowingly and intentionally adopted."

3. The outcome of the trial would not have been different if the defendant had been given the tape. In making this determination, the district court relied upon the evidence supporting Crimaldi's account of the crucial meeting:

"The defendant's conviction was based upon eyewitness accounts of a controlled transaction, preceded by a tape-recorded telephone conversation and supported by on the scene photographs."

4. The material in the transcript raises considerable doubt as to its reliability and would have diverted attention from the true issues. The jury already knew that Crimaldi was a convicted felon, a government informant and a possible juice collector.

After marshalling the foregoing reasons supporting its decision to deny a new trial, the district court remarked that the Government was not blameless, for the trial prosecutor should have been made aware of the tape by others in the Government. The trial judge also noted that it would then have been "the better part of valor" to turn it over to the defense or let the court evaluate it *in camera*.

We affirm the district court's denial of a new trial.

Whether Failure to Produce Tape Before or During Trial Requires Reversal Under the Jencks Act

Under the Jencks Act,[4] after a government witness has testified on direct examination, on request the Government is required to produce any statement of the witness in its possession "which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). The tape in question qualifies as a statement under that statute. 18 U.S.C. § 3500(e)(2). The Government now concedes in its brief that it should have given the tape to the court for *in camera* inspection. Judge McMillen found

[4] Petitioner raises the Jencks Act argument only in a footnote to his brief. While it is clear that he did not press this point vigorously on appeal, we decide it here.

the information contained on the tape was not relevant to Crimaldi's testimony at trial "except collaterally." Pursuant to *United States* v. *Cleveland II*, 507 F.2d 731, 736 (7th Cir. 1974), we have examined the transcript of the tape to see "whether the statements relate to the witness' direct testimony and, if so, whether it is perfectly clear that defendant was not prejudiced by their non-disclosure.." [5] The tape does show that Crimaldi had engaged in armed robbery and burglary. However, he so acknowledged on his direct examination, so that there was no prejudice to defendant in not disclosing this portion of the tape.

Defendant contends that the portion of the tape where Crimaldi admitted to various criminal activities was also producible under the Jencks Act because it could be used to impeach Crimaldi's testimony that he was working as a plumber during certain years. The tape does not preclude the possibility that Crimaldi worked as a plumber even while he was engaged in the criminal activities. Indeed, it indicates that he became a journeyman plumber after starting his services for Sam de Stefano, thereby implying that he worked as a plumber at the same time that he was engaged in unlawful conduct as a juice loan enforcer. Therefore, while it is not clear that the taped admissions were relevant to the testimony on direct regarding Crimaldi's employment as a plumber, it is perfectly clear that defendant was not prejudiced by the Government's failure to release these excerpts. Since the trial judge was correct in his analysis that the tape does not otherwise relate to the subject matter of Crimaldi's direct examination, the Government's failure to tender

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[5] See *United States* v. *Cleveland I*, 477 F.2d 310, 316 n. 9 (7th Cir. 1973).

the tape to the trial judge for *in camera* inspection during the trial does not constitute reversible error.

Whether Non-Production of Tape Was Harmless Error Under Brady

Next we must consider whether the doctrine of *Brady* v. *Maryland, supra*, requires reversal for failure to produce the tape. In a series of cases, the Supreme Court has spoken to the due process requirement for forthrightness on the part of the prosecution in presenting all the material evidence to the jury. *Mooney* v. *Holohan*, 294 U.S. 103; *Napue* v. *Illinois, supra; Brady* v. *Maryland, supra; Giglio* v. *United States, supra.* It is clear that the Government has an obligation to reveal to the defense such evidence in its possession as would be material to impeaching a prosecution witness. *Brady, supra; Giglio, supra; Marrero* v. *United States,* ..... F.2d ..... (7th Cir. No. 74-1177. decided May 14, 1975), slip opinion at 3; *United States* v. *Crisona*, 416 F.2d 107, 115 (2d Cir. 1969), certiorari denied, 397 U.S. 961. However, under *Brady*, as interpreted in *Moore* v. *Illinois*, 408 U.S. 786, the defendant is not entitled to a reversal unless "in the light of all the evidence" introduced at trial the unrevealed evidence is material. *Moore* v. *Illinois, supra*, at 795, 797. Thus the materiality determination is not to be made in a vacuum; rather it must be made in the context of all the evidence introduced at trial. In our view, it is unnecessary to make the materiality determination under *Brady* in this case because it is clear that, even assuming that the tape was "material" in the *Brady* sense, government counsel's good faith failure to reveal it to the defense was harmless error.

Assuming that the tape should have been produced, the trial judge was correct in noting that the particular prosecutor's ignorance of the tape's existence will not fully

justify the Government's failure to produce it. See *Giglio* v. *United States, supra,* at 154; *Santobello* v. *New York,* 404 U.S. 257, 262; *United States* v. *Ott,* 489 F.2d 872, 874-875 (7th Cir. 1973); *Clarke* v. *Burke,* 440 F.2d 853, 855 (7th Cir. 1971); American Bar Association Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial, § 2.1(d) and comment (e), at 78 (1970). In *Brady* v. *Maryland, supra,* at 87, the Supreme Court held:

> "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution*" (emphasis added).

However, a court should be less inclined to hold unproduced evidence immaterial or to hold the non-production of admittedly material evidence harmless error if the prosecutor's failure to reveal the evidence was not in good faith. See *United States* v. *Gerard,* 491 F.2d 1300, 1302 (9th Cir. 1973); *United States* v. *Butler,* ..... F.2d ..... (9th Cir. Nos. 74-2000 and 74-2201, decided December 18, 1974), slip op. at 7-8; see also, *Clarke* v. *Burke, supra,* at 855; *United States* v. *Keough,* 391 F.2d 138, 148 (2d Cir. 1968). On the other hand, if the non-production is in good faith, no special benefit of the doubt need be given the defendant's position.

In the instant case, the district court did not find that the government attorneys concealed the existence of the tape out of improper prosecutorial motives or otherwise in bad faith. It appears from its order denying the new trial that the district court credited the testimony of the government attorneys tending to show that the failure to reveal the tape to the court was in good faith. Conse-

quently, neither the Government nor the defendant is entitled to any special treatment as to the harmless error issue.

The Government asserts that even if the tape were producible under *Brady*, the Government's failure to produce it was harmless error because (1) much of the impeachment material on the tape was known to the defendant and was in evidence at trial; (2) the crucial parts of Crimaldi's testimony were thoroughly corroborated by other testimony and tape recordings; (3) Crimaldi was substantially impeached before the jury; and (4) the opportunity to explore an area of impeachment that was on the tape was deliberately avoided by defense counsel as a matter of trial strategy. We agree that any error was harmless.

The tape does show Crimaldi's convictions, but they were put before the jury on direct examination. Furthermore, the defendant's counsel was provided with Crimaldi's arrest and conviction record prior to trial.[6] Thus defendant cannot fairly complain of perhaps the most potent impeachment evidence on the tapes.

The corroboration of Crimaldi's most material testimony is virtually complete. The actual transfer of the narcotics was witnessed by Agent Cruz. Crimaldi was searched for narcotics before meeting the defendant and none were found. Nor was the cigarette package containing the drugs on Crimaldi's person or in his car when he departed for the meeting with the defendant. Crimaldi's testimony that a cocaine sale was discussed during his first meeting with the defendant was corroborated by an

[6] Unlike the situation in *People* v. *Galloway*, 59 Ill.2d 158 (1974), there was no false representation of Crimaldi's arrest record.

agent who heard the conversation via hidden radio. The tape-recorded telephone conversations about possible availability of the other "five" and about Esposito's decision to break his date with Crimaldi because of the "heat" are also corroborative of Crimaldi's story. In light of all this corroboration, the establishment of Crimaldi's personal unreliability could mean little to the jury. *United States* v. *Teague*, 445 F.2d 114, 121 (7th Cir. 1971).

Crimaldi's two prior felony convictions were put before the jury, so that his personal reliability was called into serious question anyway. Moreover, it was made clear that Crimaldi was a paid informant for the Bureau and that he received a bonus if his performance pleased the Bureau. There was a question put about Crimaldi's employment as a juice loan collector, which he was clearly reluctant to confirm or deny. Also, one of the Bureau agents testified that Crimaldi had been associated with "organized crime." Defendant's brother testified that he had received heroin from Crimaldi, and defendant testified that Crimaldi approached him for money which he owed "in connection with his juice racket that he is connected with and is a terrorist for * * *." Thus the jury had sufficient facts to weigh Crimaldi's credibility, so that a new trial was not required. See *Flores* v. *Craven*, 503 F.2d 1030 (9th Cir. 1974; *per curiam*), certiorari denied, 420 U.S. 911. Finally, the jury's question about Agent Cruz' observation of the actual transfer of the cocaine indicates that its members were interested in the corroborative testimony about the transaction, rather than merely accepting Crimaldi's account at face value.

At the May 1974 hearing on the motion for a new trial, defendant testified that he knew Crimaldi's reputation as a murderer, but did not so advise his counsel. In this

posture he cannot now complain that his counsel was entitled to see a transcript of the May 1971 interview to the same effect. Esposito also testified that he told his trial counsel that Crimaldi was a juice loan terrorist. After touching on the subject in cross-examining Crimaldi, Esposito's trial counsel did not ask the judge to compel Crimaldi to answer whether he had been a juice collector or to explain his refusal to answer. We agree with the trial court's characterization that "this was a matter of trial strategy which was knowingly and intentionally adopted."

As Judge Pell stated in *United States* v. *Cook*, 432 F.2d 1093, 1101-1102 (7th Cir. 1970), certiorari denied, 401 U.S. 996:

> "Where parties, even in a criminal case, knowingly and deliberately turn down a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time after a decision has been rendered adverse to them, to obtain a retrial according to the procedure which they had voluntarily discarded and waived."

In light of the extensive corroborative testimony and the other factors discussed above, the revelation of the tape and the defendant's use of that information therefrom which would have been made available to him by the district court after an *in camera* inspection would not have affected the jury's assessment of Crimaldi's credibility. Also, in view of the vigorous defense, the jury was obviously cautious about Crimaldi's personal truthfulness and therefore relied on the corroborative evidence to find defendant guilty. Since the tape had impeachment value only, it would not have affected the jury's assessment of Crimaldi's credibility if given to the defense, its revelation would not have produced a reasonable doubt in the

eyes of the jury.[7] *Giglio, supra,* at 154; *United States* v. *Marrero, supra; United States* v. *Tankersley,* 492 F.2d 962, 967-968 (7th Cir. 1974); *Grant* v. *Alldredge,* 498 F.2d 376, 382 (2d Cir. 1974); *United States* v. *Butler, supra,* at 7-8.[8]

Alleged Government Exploitation of False Testimony

Defendant's appellate counsel insists that the prosecutor sought to impress the jury that Crimaldi was a plumber whose criminal escapades were remote in time. Defendant asserts that this amounts to Government exploitation of testimony known to be false by virtue of the tape.

At the trial, Bureau Agent Haight stated that he could not recall being told that Crimaldi had been in the juice loan business. However, defendant and his counsel knew of that activity of Crimaldi. While Haight admitted at the May 1974 post-trial hearing that he was in error in his earlier testimony, the district judge found:

> "We agree that Agent Haight has been impeached but not that he committed perjury. Furthermore, his

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[7] Assuming that the impeachment evidence is "evidence favorable to the defendant" within local Criminal Rule 2.04(a)(6) and (e), any violation thereof with respect to the taped interview is harmless for the reasons noted in the discussion of defendant's *Brady* argument.

[8] Defendant relies on *Butler,* but there the newly discovered tape of a surreptitiously recorded conversation between the key government witness and appellant and post-trial affidavits indicated that the Government had promised the witness lenient treatment in return for his testimony. The court held that such evidence "would certainly have affected the weight given [the witness'] testimony by the jury."

> testimony was not crucial to defendant's guilt, and his credibility was not at stake. The government should not be penalized because of the carelessness of this witness."

Since the trial judge was in a position to assess Haight's credibility at trial and at the hearing on the motion for a new trial, we should not set aside his assessment, particularly since Esposito's trial counsel pursued the juice loan angle as much as he desired. See *United States* v. *Acarino,* 408 F.2d 512, 516 (2d Cir. 1969), certiorari denied, 395 U.S. 961.

As has already been discussed, the tape does not establish that Crimaldi worked in the juice loan business to the exclusion of his work as a plumber. At the trial, under cross-examination by the prosecutor, an officer of the Chicago plumbers' union stated that Crimaldi might have been working as a plumber after his March 1969 expulsion from the union. While the transcript of the May 1971 taped interview with Crimaldi states that he became a journeyman plumber in 1955 or thereabouts, the transcript does not show that he abandoned that occupation in 1969. Nothing in the record or at the post-trial hearing shows that Crimaldi did not practice his trade as he testified.

Closing Argument

Defense counsel assails the prosecutor's trial summation for "attacking the crucial defense theory that Crimaldi was an informer with a clear motive to lie." However, that part of the prosecutor's summation was a proper response to the distortions in Esposito's trial counsel's closing argument asking the jury to infer that Crimaldi had been caught doing something, "probably selling heroin" and was then set up by the Government "as a pigeon." He stated that Crimaldi had become a partner of the Bureau by giving the Bureau information

in return for "a pass." None of this was supportable by the record nor indeed by the transcript of the May 1971 tape of Crimaldi's Washington, D.C. interview. Therefore, the criticized rebuttal argument was justified.

Part of the rebuttal argument is quoted critically in defendant's brief 29:

> "* * * [T]here is absolutely no evidence that [a promise of no jail in return for favorable testimony] is the case here * * * And in fact the evidence is to the contrary.
>
> "* * * [Crimaldi] told you when he was in jail, and he told you what for, twenty years ago * * * Agent Haight told you that he was not under charge now and that there was nothing pending against him now. So that whole theory about doing it to get out from under, worthless."

The taped interview and record are not to the contrary. Rather than picturing Crimaldi as a model citizen, the prosecutor stressed that even if the jury believed that Crimaldi was involved in juice collection or some other criminal activity, his testimony was confirmed "by a tape recorder, by a surveillance agent, or by the Kel set."

Defense counsel relies on other portions of the prosecutor's closing argument as compelling reversal. However, no objection was raised to these comments at trial and therefore defendant must rely on a plain error theory. Fed. R. Cr. P. 51 and 52.

Specifically, defendant claims that the government wrongfully characterized him as "a narcotics pusher of the first order," a man "in the business of selling cocaine," "an incredibly stupid man," and "the lowest form of life in the country." However, Esposito's own trial counsel had referred to Crimaldi as "the lowest form of life." "a peddler himself" and "a bounty hunter."

Defense counsel referred to "rats like Crimaldi" and a "worm like Crimaldi." He referred to his own client as "Mr. Goof."

In this setting, it was permissible for the prosecutor to respond that one who sells narcotics was a form of life lower than an informant. By calling Esposito "incredibly stupid," the prosecutor was merely paralleling defense counsel's characterization of Esposito as "Mr. Goof." By mentioning that defendant was "in the business of selling cocaine" and a "narcotics pusher of the first order," the prosecutor was referring to the evidence in the record that Esposito had a source for cocaine and intended to sell Crimaldi 25 ounces of cocaine after only a day's notice.

Finally, to answer Esposito's lawyer's statement that defendant did not need to be a pusher because he earned $35,000 a year as a union official, the prosecutor stated: "Although he [Esposito] makes $35,000, which is a considerable salary, when you are selling cocaine, it is considerably more than tax free." This statement was unfortunate and confusing but it legitimately shows that in selling cocaine Esposito might have been motivated by a desire to make more than $35,000 a year. It certainly did not tell the jury that Esposito did not report narcotics income on his tax return, as stated in defendant's brief. As in *United States* v. *Skelley*, 501 F.2d 447, 456 (7th Cir. 1974), certiorari denied, 419 U.S. 1051, this comment does not rise to the dignity of plain error requiring reversal in the absence of an objection below.

Conflict in Testimony of Government Witnesses

As his last point, defendant asserts that newly discovered facts suggest perjury on the part of the government witnesses necessitating a new trial.

As to Agent Haight, defendant asserts that his testimony that he performed a field test on the contents of the Parliament cigarette package given Crimaldi by Esposito "a very short period of time" after its receipt from Crimaldi was inconsistent with his testimony in two later federal trials that Haight and Nolan had conducted a surveillance of Esposito after receiving the cigarette package from Crimaldi. The testimony at the two later trials is consistent with Haight's testimony on cross that he began his surveillance of Esposito at 5:00 p.m. on June 23 until 7:00 or 7:30 p.m., thus placing him at the Bureau when that surveillance ceased. The length of time until the field test is not crucial and, in any event, Agent Haight might consider two hours a relatively short period. Similarly, assuming certain traffic patterns, it was perfectly possible for Haight to see Esposito enter the Thirsty Whale Restaurant at 5:30 p.m., dispelling defendant's argument that perjury was proved by physical impossibility.

As to Agent Cruz, defendant asserts that his grand jury testimony was in conflict with his trial testimony. Before the grand jury, Cruz said that Crimaldi arrived first at the afternoon meeting at the Hyatt Regency O'Hare, while at Esposito's trial he said that Esposito had arrived first. However, Cruz' account of the actual transfer did not vary. Moreover, at the perjury trial of Esposito (not involved on this appeal), Cruz explained that he was mistaken before the grand jury and that Esposito was actually the first to arrive.

As to Agent Nolan, defense counsel states that at the trial, Nolan testified to rather extensive searches of Crimaldi's automobile, once in the morning and twice in the afternoon of June 23. At Esposito's perjury trial a year later, Crimaldi testified that the third afternoon search

was more cursory. The more important afternoon search occurred before Crimaldi went to meet Esposito, and no inconsistency has been charged with testimony as to that search. Once Crimaldi gave the agents the narcotic, little reason for a thorough search remained. In any event, even at the perjury trial, Crimaldi admitted that some type of third search had occurred in the afternoon when he returned with the cigarette package.

With respect to the alleged inconsistencies in the testimony of government witnesses in Esposito's narcotics trial and in subsequent cases, Judge McMillen found as follows:

> "The difference in testimony relates to details subsequent to the alleged offense, primarily. The eyewitness accounts, recorded telephone calls and photographs would be substantially unaffected by subsequent inconsistent testimony."

Substantial evidence supports this conclusion of the district court, so that a new trial is not necessary. *United States* v. *Johnson,* 327 U.S. 106, 113.

JUDGMENT AFFIRMED.

SWYGERT, *Circuit Judge,* concurring.

I concur in the majority's decision that the failure to produce this tape is harmless error, but I cannot agree with all that is said to support that conclusion. Crimaldi's statement contains impeachment material that the defense did not already have. Even if the defendant and his attorney suspected that Crimaldi had been a "juice collector", actual proof of this fact was necessary for effective and ethical impeachment. Such proof is contained in Crimaldi's statement, and had defense counsel been aware of it he might have been in a position to employ a different

"trial strategy." I believe that Crimaldi's admissions concerning his criminal activity could have been used to impeach his testimony to a much greater degree than was done.

I agree with the finding of harmless error, however, because I believe that Crimaldi's credibility was not a crucial factor. As Judge Cummings demonstrates, his story was fully corroborated by tape recordings or testimony of governmental agents. The prosecutor in the initial portion of his closing argument practically conceded Crimaldi's unreliability. Instead, he asked the jury to consider all of the other evidence which, in my opinion, is overwhelming. I am convinced that this is what impressed the jurors and that full knowledge of Crimaldi's activities would not have influenced their verdict. Accordingly, I join in the affirmance.

I am compelled, however, to register my disquietude with the Government's withholding of this tape. Perhaps persons with criminal backgrounds such as Crimaldi's must be employed by governmental agencies. But at least both the agency and the prosecutors should take particular care in discovering all statements and information relating to such informants that should be given to defense counsel. The use of such witnesses puts this special burden on the prosecutor. Lack of communication between sections of the Justice Department and poor memories of governmental agents are weak excuses. To me the Government's thoughtless, cavalier conduct in this case comes to the very brink of requiring reversal.

The use of informants such as Crimaldi who have an admitted extensive, serious, and unpunished criminal background is a questionable practice to begin with, in my

opinion. The failure of the Government to make the information in Crimaldi's statement available to the trial judge *in camera* (as the Government now concedes was its duty), additionally makes my vote for an affirmance a reluctant one.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Thomas R. McMillen
Cause No. 71 CR 980 Date Juy 12, 1974

Title of Cause—U.S.A. vs. Esposito

Enter decision that defendant's motion for a new trial filed February 25, 1974 is denied, and he is ordered to appear for a hearing in aggravation and mitigation on Tuesday, July 23, 1974 at 10:00 a. m. (Draft).

/s/ *McMillen J.*

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY ESPOSITO,

Defendant.

NO. 71 CR 980
DECISION ON DEFENDANT'S MOTION
FOR A NEW TRIAL

This case came on to be heard on defendant's motion for discovery of the prosecutors' pre-trial knowledge of evidence which might have been beneficial to the defense. This evidence consists primarily of a taped interview of the government's chief witness, a "special employee" named Charles Crimaldi, made May 25 and 26, 1971 by Federal agents. The interview has now been reduced to a transcript of 131 pages which the court has examined *in camera*. Although the transcript is not identified as originating with Crimaldi and is somewhat ambiguous in this respect, the government does not deny that the tape was made by him and that its existence was known to the prosecutors before trial. The question now presented is whether failure to reveal it to the defense before trial is grounds for setting aside the jury's verdict of guilty. We do not believe it is.

For the purpose of this decision we do not believe the tape need be revealed to the defendant at this time. The

tape contains much irrelevant and confidential information about criminal activities of persons other than Crimaldi. It does not impeach his trial testimony. It does confirm the defendant's information that Crimaldi was involved in collecting for a juice loan racketeer and that he has admitted to various illegal acts in this occupation as well as to other illegal acts, some similar to those for which he had previously been convicted and some not. He does not admit to murders, kidnappings (other than to aid collections) or to any activities involving narcotics. If defendant wishes the transcript in the record, it will be sealed and retained by the clerk.

Our decision on the motion is based on several grounds. First, the information revealed in the transcript is not relevant to the witness's testimony at trial except collaterally. The tape was made a month before the transaction of which defendant was found guilty and thus of course does not refer to it. The defendant is mentioned in the transcript on a few occasions but not in an exculpatory manner. Thus the only use which the defense could have made of the tape at trial would be in cross-examining Crimaldi about his reputation and criminal activities. Neither *Brady* nor any of the controlling decisions relied upon by defendant require divulgence of this type of material in the absence of perjury. *Napue* v. *Illinois,* 360 U.S. 264 (1959); *Giglio* v. *United States,* 405 U.S. 150 (1972).

Secondly, the matters discussed by Crimaldi in the interview are largely connected with his association with Sam deStefano in the juice loan business. Defendant knew of this activity by reputation, but his attorney did not exhaust the inquiry at the time of trial. This was a matter of trial strategy which was knowingly and intentionally adopted. It is a matter of speculation as to what the outcome would have been had this line of inquiry been pur-

sued at trial, with or without the tape, but defendant's trial attorney failed to lay a foundation for impeachment by the newly discovered tape.

Thirdly, it is difficult to believe that the outcome of the trial would have been different if the defendant had been given the tape in advance. The defendant's conviction was based upon eyewitness accounts of a controlled transaction, preceeded by a tape-recorded telephone conversation and supported by on-the scene photographs. One can never know what a different jury would do with different trial attorneys armed with additional impeaching evidence, unless a new trial is held. The government should not be put to this test, however, unless the post-trial discovery requires it. In our opinion, the defendant would not be likely to prevail on a new trial with the new evidence. He has been given his day in court.

Lastly, the material in the transcript raises considerable doubt as to its reliability. Most of Crimaldi's statements would be unverifiable either by the defense or by the government. They appear to be an informant's attempt to impress government agents for his own purposes. To have brought this information out on Crimaldi's examination would have diverted attention from the true issues without advancing the case for either side. We doubt if the witness's admissions about himself would have been given much additional weight by the triers of fact, since he was known to be a convicted felon, a government informant and, by virtue of his refusal to answer questions, a possible juice collector.

Defendant also again attacks the credibility of the government agent Haight. At the hearing on defendant's pending motion, he did "correct" his trial testimony with respect to his knowledge of Crimaldi's prior activities,

but his trial testimony on this point was somewhat evasive and inconclusive. We agree that Agent Haight has been impeached but not that he committed perjury. Furthermore, his testimony was not crucial to the defendant's guilt, and his credibility was not at stake. The government should not be penalized because of the carelessness of this witness. cf. *Moore* v. *Illinois,* 408 U.S. 786 (1972).

The government is not blameless in this matter. The trial prosecutors should have been made aware of the tape and cannot be heard to justify non-disclosure on the ground that no demand was made by the defendant's attorney. Had the trial prosecutors known the contents of the tape, the better part of valor would have been to turn it over to the defense or let the court evaluate it *in camera.* cf. *United States* v. *Tankersley,* 492 F.2d 962, 968 (7th Cir. 1974); *United States* v. *Ott,* 489 F.2d 872 (7th Cir. 1973). On the other hand, even if they were fully aware of the contents of the tape, we do not believe they have a non-discretionary duty to turn over to the defense all investigatory material in which a witness is involved, regardless of its relevancy and merely because it might aid in cross-examining this witness with respect to his prior criminal activities.

It Is Therefore Ordered, Adjudged And Decreed that defendant's motion for a new trial filed February 25, 1974 is denied, and he is ordered to appear for a hearing in aggravation and mitigation on Tuesday, July 23, 1974 at 10:00 a. m.

Enter:

/s/ *Thomas R. McMillen*
Judge, U. S. District Court

Dated: July 12, 1974

APPENDIX 3

The transcript of proceedings had in this case on September 13, 1974 states in pertinent part:

> The Court: "I do not like to put people to the expense of taking an appeal, but I certainly would not try to discourage the defendant from taking one in this case. I think there is a very serious question involved in the prosecutor's actions in this case, as I pointed out in my decision.
>
> I have even given some thought to changing that decision and letting the Government take the appeal. But I have decided to stand on the decision because I even have reviewed it as late as this morning, and still feel that it is probably correct. But there have been some Court of Appeals decisions recently that Mr. Marrs, I am sure, is familiar with because I think he was involved in one of the cases, that give me some doubt that the Court of Appeals will affirm my decision. They have been pretty free to change the result of jury verdicts. They may feel that the defendant is entitled to a new trial in this case."

APPENDIX 4

Opinion by Judge Cummings

(Judge Swygert concurring)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 18, 1975

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 74-1770 vs.

ANTHONY ESPOSITO,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
71 Cr 980
Thomas R. McMillen, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
September 16, 1975.

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 74-1770 vs.

ANTHONY ESPOSITO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

---

(71 CR 980)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

APPENDIX 6

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Jencks Act (18 U.S.C. § 3500) provides:

> § 3500. *Demands for production of statements and reports of witnesses*
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or

such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Added Pub.L. 85—269, Sept. 2, 1957, 71 Stat. 595, and amended Pub.L. 91—452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.

Rule 2.04 of the Criminal Rules of the United States District Court for the Northern District of Illinois provides:

2.04 *Pretrial discovery and inspection*

(a) Within five (5) days after the arraignment of the U.S. Attorney and the defendant's attorney shall confer and, upon request, the government shall:

(1) Permit defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known,

or by the exercise of due diligence may become known, to the attorney for the government;

(2) Permit defendant's attorney to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(3) Permit defendant's attorney to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(4) Permit defendant's attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which is the property of the defendant and which are within the possession, custody or control of the government;

(5) Permit defendant's attorney to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record.

(6) Permit defendant's attorney to inspect, copy or photograph any evidence favorable to the defendant.

(b) If, in the judgment of the U.S. Attorney, it would not be in the interests of justice to make any one or more disclosures set forth in paragraph (a) and requested by defendant's counsel, disclosure may be declined. A declination of any requested disclosure shall be in writing, directed to defendant's counsel, and signed personally by the U.S. Attorney or the First Assistant U.S. Attorney, and shall specify the types of disclosures that are declined. If the defendant seeks to challenge the declination, he shall proceed pursuant to subsection (c) below.

(c) Additional discovery or inspection. If additional discovery or inspection is sought, defendant's attorney shall confer with the appropriate Assistant U.S. Attorney within ten (10) days of the arraignment (or such later time as may be set by the Court for the filing of pre-trial motions) with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court. The request may be oral or written and the U.S. Attorney shall respond in like manner.

(d) In the event defendant thereafter moves for additional discovery or inspection, his motion shall be filed within the time set by the Court for the filing of pre-trial motions. It shall contain:

(1) the statement that the prescribed conference was held;

(2) the date of said conference;

(3) the name of the Assistant U.S. Attorney with whom conference was held; and

(4) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of defendant's motion.

(e) Any duty of disclosure and discovery set forth in this Rule is a continuing one and the U.S. Attorney shall produce any additional information gained by the government.

(f) Any disclosure granted by the government pursuant to this Rule of material within the purview of Rules 16(a)(2) and 16(b), Federal Rules of Criminal Procedure, shall be considered as relief sought by the defendant and granted by the Court.

SUPREME COURT, U. S.

FILED
JAN 8 1976
MICHAEL RODAK, JR., CLERK

No. 75-579

In the Supreme Court of the United States

OCTOBER TERM 1975

ANTHONY ESPOSITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-579

ANTHONY ESPOSITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

I.

REASON FOR FILING THIS SUPPLEMENTAL BRIEF

This supplemental brief is filed pursuant to Supreme Court Rule 24(5) in order to call this Court's attention to the virtual identity in the question presented by the instant case and that presented in *United States* v. *Agurs* (Supreme Court Docket No. 75-491). On petition of the Solicitor General, certiorari was granted in *Agurs* on November 17, 1975, after the petition in the present case had been filed.

II.

THE REASONS FOR GRANTING CERTIORARI IN AGURS APPLY A FORTIORI TO ESPOSITO

Both *Agurs* and *Esposito* present the question of whether the prosecutor's non-disclosure of information favorable to the defense, but not directly related to events out of which the indictment arose, deprived defendant of his constitutional rights. In *Agurs,* a murder prosecution, the undisclosed information concerned the criminal history of the decedent. In *Esposito,* a narcotics (cocaine) prosecution, the prosecutors withheld the fact that their most important witness (an informer who set up the transaction) had confessed to a number of very serious crimes for which he was never prosecuted. In neither *Esposito* nor *Agurs* was there a specific defense request for the precise information which was not disclosed. In *Esposito,* unlike *Agurs,* however, there was a general defense request for *Brady* material. Most significantly *Esposito* was a case in which the prosecutor *knew* at the time of trial of the damaging impeachment of his star witness but failed to disclose it.

In successfully urging that certiorari be granted in *Agurs,* the Solicitor General argued that the Court of Appeals opinion in that case carried "potentially revolutionary implications for the standards of conduct governing the behavior of federal government prosecutors" (A. 13) and that this Court's guidance was needed to enable the government to formulate disclosure standards for its prosecutors. (A. 7) We submit that those arguments apply no less to *Esposito,* a case in which the Seventh Circuit restricts the prosecutor's traditional disclosure responsibilities, than to *Agurs,* in which the District of Columbia Circuit expanded those duties.

The other reasons recited by the government for granting a writ in *Agurs* apply a fortiori to *Esposito.*

In *Agurs* the Solicitor General pointed out that (A. at 10):

> "[a] deliberate governmental decision to suppress information of central importance to the defense, made for the specific purpose of deception, or even a failure to disclose exculpatory evidence whose high value to the defense could not escape the prosecutor's attention, may violate the prosecution's obligation to ensure, *sua sponte*, that the accused is not wrongfully convicted."

This is precisely what occurred in *Esposito.* The prosecutors knew full well that the *Esposito* defense was aimed at discrediting the informer (Crimaldi), showing that he had a special selfish motive to help the government and was fully capable of "setting up" and falsely implicating Mr. Esposito. Yet, even with that knowledge, the prosecutors failed to disclose either in response to the *Brady* request or at the time of trial that their witness had admitted to a life of heinous crimes—crimes for which he has never been prosecuted. As we point out in the Esposito petition the government's trial counsel exacerbated the nondisclosure by arguing to the jury that the informer was a solid citizen with no motive to lie.

In urging that a writ of certiorari issue in *Agurs,* the government pointed out that there had been no *Brady* request made in that case, and since defense counsel was aware of the underlying facts, he could have drafted an appropriate request for the information in order to trigger the prosecutor's search for it. In contrast, in *Esposito* there was a general request for *Brady* material, the response to which did not reveal the existence of any government debriefings of the informer, and defense counsel

had no way of knowing that the informer had confessed to a litany of unprosecuted crimes. It was only after trial when the informer went to the newspapers with his life history that defense counsel first guessed that the prosecution may have withheld important impeaching evidence.

The non-disclosure in *Agurs* may be excused, as is pointed out in the petition for writ of certiorari (A. 4), by virtue of the fact that neither of the prosecution nor the defense believed the undisclosed evidence to be admissible. But there is no question that the evidence withheld in *Esposito* would have been usable to impeach the informer's testimony.

III.

CONCLUSION

This Court has seen fit to grant certiorari in the *Agurs* case. We respectfully submit that the similarity of the question presented by the present case to that presented in *Agurs* makes it appropriate that the cases be considered together.

Respectfully submitted,

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Attorneys for Petitioner
Anthony Esposito

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-579

ANTHONY ESPOSITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 523 F. 2d 242.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1975, and a petition for rehearing was denied on September 16, 1975 (Pet. App. 31). The petition for a writ of certiorari was filed on October 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether information found in the prosecutor's files after trial was "newly discovered" for purposes of petitioner's new trial motion, where some of the information was known to petitioner prior to trial and the rest could have been obtained through the exercise of due diligence.

2. Whether a new trial was required because the prosecutor failed spontaneously to disclose to the defense the contents of a tape recorded interview in which the prosecution's principal witness admitted engaging in past criminal conduct, notwithstanding the court of appeals' finding that the additional impeaching information would have affected neither the jury's assessment of the witness's credibility nor its verdict of guilty.

3. Whether a new trial is required because of prosecutorial conduct that petitioner characterizes as improper but that the court of appeals found was not improper.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on both counts of an indictment charging him with the possession and subsequent distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). After an interim appeal,[1] petitioner was sentenced to

[1] The district court initially granted a motion for arrest of judgment on the ground that the prosecution had failed to prove the required "nexus" with interstate commerce. The court of appeals reversed and remanded for entry of judgment pursuant to the jury's verdict. *United States* v. *Esposito*, 492 F. 2d 6 (C.A. 7), certiorari denied, 414 U.S. 1135.

BLEED THROUGH

concurrent terms of two years' imprisonment and three years' special parole on each count. He thereafter moved for a new trial on the basis of newly discovered evidence, and the district court denied the motion (Pet. App. 24–28). The court of appeals affirmed (Pet. App. 1–23).

1. The evidence at trial is summarized accurately in the opinion of the court of appeals (Pet. App. 2–6). Petitioner agreed to sell cocaine to Charles Crimaldi, a government informant, and gave him a sample of the substance. Although the actual sale was never consummated, negotiations between the two men were conducted in person and over the telephone. Crimaldi wore a transmitting device during his two meetings with petitioner, and federal narcotics agents were able to monitor the conversations. An agent observed the second meeting and saw petitioner give Crimaldi a cigarette package containing the cocaine sample. Several telephone conversations between petitioner and Crimaldi were recorded with Crimaldi's consent, and the recordings were played for the jury.

Crimaldi acknowledged during his testimony that he had been convicted of armed robbery and burglary in 1950 and 1951 and that he had been a paid government informant for several years. Defense counsel asked Crimaldi on cross-examination whether he had "worked as a juice collector [*i.e.*, a loan-shark collector]" (Tr. 127).[2] Crimaldi replied, "I don't believe I have to answer that, do I?" (*ibid.*). Defense counsel stated, "No, you don't, not for me. That is all I

[2] "Tr." refers to the reporter's transcript of petitioner's trial. "H." refers to the transcript of the hearing on petitioner's motion for a new trial.

have" (*ibid.*). Counsel sought no ruling directing the witness to answer the question.

Crimaldi's criminal activity was again raised by defense counsel on cross-examination of Agent Haight. In order to place in context petitioner's charge that Agent Haight's testimony was untruthful, we set forth in a footnote the relevant portions of the pertinent colloquy.[3]

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[3] The testimony to which petitioner points (Pet. 6) appears at Tr. 174–176:

"[DEFENSE COUNSEL]: Q. During the time that you were working with Crimaldi, other than the work that he was doing for you, did you know whether or not he was involved in any other illegal activities?

"A. No, sir, I do not.

* * * * *

"Q. You do not?

"A. I do not know if he was.

"Q. Well, when you first started to work with him in April or [*sic*] you certainly inquired into his background, didn't you?

"A. I was aware that he was a convicted felon.

"Q. You were aware that he was engaged in illegal activities other than the work he was doing for the Bureau, isn't that right?

"A. No, sir. * * * No, sir, not at the time I knew him.

"Q. I am not talking about that. I am talking about the time prior to the time that you knew him you were aware of his illegal activities, were you not?

"A. I was not aware of them.

"Q. No one told you he was in the juice business?

* * * * *

"A. I don't recall if I was ever advised of that or not, sir.

"Q. You knew it, though, didn't you?

"A. Personally? No, sir.

"Q. You didn't know that Crimaldi was in the juice business?

"A. I was unaware of it.

"Q. You didn't know too much about Crimaldi then, did you, when you first started to work with him?

"A. No, sir. As I say, I was first introduced to him in April of '71."

BLEED THROUGH

In closing argument, the prosecutor emphasized the evidence corroborating Crimaldi's testimony. He stated (Tr. 340–341):

> Whether or not you believe he was involved in juice collection or whether or not you believe he had some other criminal activity is not particularly important to this case. Perhaps if it were just Mr. Crimaldi alone it would be more important. But on every single point of this investigation when Mr. Crimaldi did something, it was confirmed either by a tape recorder, by a surveillance agent, or by the Kel set [transmitter]. He was never alone.

Defense counsel vigorously attacked Crimaldi's credibility, suggesting, despite the absence of evidentiary support, that the jury could reasonably infer that Crimaldi became an informant because he had been "caught selling heroin back in 1969."[4] The prosecutor responded on rebuttal that there was no evi-

---

[4] Defense counsel stated (Tr. 352–353):

"Now let's get back to Crimaldi and what kind of a person he is. I will tell you what paid informers—what happens to them. First of all, they generally get caught doing something. And in this case, probably selling heroin. I think that is a reasonable inference that you can draw from the evidence. Crimaldi isn't going to tell you that. Haight says he doesn't know about it.

"So I am entitled and I think you are too, the reasonable inference is that Crimaldi got caught selling heroin back in 1969 and they set him up as a pigeon. Do you know how they do that? The same way they tried to do it to Esposito. They make a deal. You know, give us some information and we will give you a pass. That is how Crimaldi becomes a partner of the Bureau of Narcotics. That is how these people spend your money and mine on rats like Crimaldi."

dentiary support for defense counsel's speculative assertion.[5]

2. In May 1971, about one month prior to the cocaine transaction involved in this case and after Crimaldi had agreed to become a government informant on organized crime matters, Crimaldi was interviewed in Washington, D.C., by Agents Braseth and Borner of the Bureau of Narcotics and Dangerous Drugs (H. 36, 45, 51, 94). The interview was tape recorded. In the course of the interview, described as "a running commentary as to who was in the heirarchy of the criminal syndicate at that time" (H. 20), Crimaldi discussed his involvement in a variety of criminal activities (H. 120–121), including "collecting for a juice loan racketeer" (Pet. App. 26).

The tape of the interview was turned over to representatives of the Chicago Strike Force (H. 46). Al-

[5] The prosecutor stated (Tr. 369–370):

"I asked you, please, not to consider what the lawyers say as evidence, and I want to show you what I mean. Because Mr. Cogan told you about the heroin and Mr. Cogan told you how informants usually work and generally they are caught for doing something and so that they won't get put in jail for doing that, they promise to work for the Government and help the Government. But there is absolutely no evidence that that is the case here. That is Mr. Cogan. That is not the evidence. And in fact, the evidence is to the contrary.

"This defendant has never—and he told you when he was in jail, and he told you what for, twenty years ago, armed robbery and burglary. Never narcotics. Agent Haight told you that he was not under charge now and that there was nothing pending against him now. So that whole theory about doing it to get out from under, worthless. It is worthless because it did not come from up there as testimony, but came from Mr. Cogan as surmise."

BLEED THROUGH

though Strike Force attorney Peter Vaira, who initiated the present prosecution, listened to a portion of the tape, he could recall no specific offenses admitted by Crimaldi on the portion of the tape he heard (H. 15, 20, 23). Vaira was transferred to Philadelphia prior to trial, and the case was reassigned to Assistant United States Attorney J. Michael Fitzsimmons. At a meeting with Fitzsimmons, Vaira, and Vaira's supervisor, Agent Braseth (who had interviewed Crimaldi) spoke of some of the matters that were discussed in the interview, including Crimaldi's past criminal activities (H. 71). There is no indication, however, that Braseth mentioned the existence of the tape or that Fitzsimmons was aware of its existence. Neither the tape nor the information on it was disclosed to defense counsel prior to trial.

After petitioner was convicted, Crimaldi testified in unrelated proceedings and made public statements concerning a variety of unprosecuted crimes that he had committed (see Pet. 5). Petitioner then filed a motion for a new trial on the basis of newly discovered evidence. On the day before the hearing on that motion, Fitzsimmons notified defense counsel that he had discovered the taped interview. The tape was subsequently transcribed at the district court's request, and the court examined the transcript *in camera* before ruling on the motion.

3. The district court denied the motion for a new trial (Pet. App. 25–28). The court found that the information on the tape "does not impeach [Crimaldi's] trial testimony" (*id.* at 26) and could have been

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used only collaterally "in cross-examining Crimaldi about his reputation and criminal activities" (*ibid.*). In the absence of perjury, the court ruled, the prosecution was not required to disclose "this type of material" (*ibid.*). "Had the trial prosecutors known the contents of the tape, the better part of valor would have been to turn it over to the defense or let the court evaluate it *in camera*" (*id.* at 28). But, the court stated, "even if they were fully aware of the contents of the tape, we do not believe they have a non-discretionary duty to turn over to the defense all investigatory material in which a witness is involved, regardless of its relevancy and merely because it might aid in cross-examining this witness with respect to his prior criminal activities" (*ibid.*).

The court also found that petitioner "knew of [Crimaldi's juice loan] activity by reputation" but that—as "a matter of trial strategy which was knowingly and intentionally adopted"—"his attorney did not exhaust the inquiry [into that matter] at the time of trial" (*id.* at 26).

Moreover, since petitioner's "conviction was based upon eyewitness accounts of a controlled transaction, preceded by a tape-recorded telephone conversation and supported by on-the-scene photographs," the district court found it "difficult to believe that the outcome of the trial would have been different if the defendant had been given the tape in advance" and therefore had been "armed with additional impeaching evidence" (*id.* at 27). "We doubt if [Crimaldi's] admis-

sions about himself would have been given much additional weight by the triers of fact, since he was known to be a convicted felon, a government informant and, by virtue of his refusal to answer questions, a possible juice collector" (*ibid.*).

Finally, the court rejected petitioner's assertion that Agent Haight committed perjury at trial. The court viewed Agent Haight's trial testimony concerning his knowledge of Crimaldi's prior criminal activity as "somewhat evasive and inconclusive" (*id.* at 28). At the hearing on the new trial motion, Haight corrected his trial testimony insofar as it may have suggested that he had been unaware of Crimaldi's criminal background during the time that Crimaldi was a government informant (see H. 110–118). The district court found (Pet. App. 28):

> We agree that Agent Haight has been impeached but not that he committed perjury. Furthermore, his testimony was not crucial to the defendant's guilt, and his credibility was not at stake. The government should not be penalized because of the carelessness of this witness.* * *

4. The court of appeals affirmed (Pet. App. 1–23). It ruled, first, that even if portions of the tape arguably should have been produced under the Jencks Act, 18 U.S.C. 3500, "it is perfectly clear that defendant was not prejudiced by the Government's failure to release these excerpts" (*id.* at 10).

Second, the court stated that "the Government has an obligation to reveal to the defense such evidence

in its possession as would be material to impeaching a prosecution witness" (*id.* at 11). But the court found it "unnecessary to make the materiality determination under *Brady* in this case because it is clear that, even assuming that the tape was 'material' in the *Brady* sense, government counsel's good faith failure to reveal it to the defense was harmless error" (*ibid.*).

The court rested that conclusion on the following considerations. (1) Crimaldi's convictions were put before the jury on direct examination, and the prosecution provided defense counsel prior to trial with Crimaldi's arrest and conviction record (*id.* at 13). (2) "The corroboration of Crimaldi's most material testimony is virtually complete," and "the establishment of Crimaldi's personal unreliability could mean little to the jury" (*id.* at 13–14).[6] (3) Crimaldi's "personal reliability was called into serious question anyway" by evidence of his prior convictions, his status as a paid informant who "received a bonus if his performance pleased the Bureau," his failure to answer the question whether he was a juice loan collector, and his association with organized crime (*id.* at 14). (4) Petitioner's counsel, as a matter of deliberate trial strategy, failed to pursue with Crimaldi the question whether he had been a juice loan collector (*id.* at 15).

[6] The court stated that "the jury's question about Agent Cruz' observation of the actual transfer of the cocaine indicates that its members were interested in the corroborative testimony about the transaction, rather than merely accepting Crimaldi's account at face value" (Pet. App. 14).

The court thus found that "the revelation of the tape and the defendant's use of that information therefrom which would have been made available to him by the district court after an *in camera* inspection would not have affected the jury's assessment of Crimaldi's credibility" (*ibid.*). The tape's "revelation would not have produced a reasonable doubt in the eyes of the jury" (*id.* at 15–16).

The court of appeals also sustained the district court's finding that Agent Haight did not commit perjury at trial and that his testimony was not crucial to petitioner's guilt (*id.* at 16–17). In addition, the court rejected petitioner's contention that the prosecutor's closing argument to the jury was at odds with the true facts concerning Crimaldi's past. The argument "was a proper response to the distortions in [petitioner's] trial counsel's closing argument" (*id.* at 17) and was not inconsistent with the contents of the taped interview or with the record (*id.* at 18).

ARGUMENT

1. Petitioner argues that he is entitled to a new trial because "the government's deliberate non-disclosure of material evidence" (Pet. 9)—namely, "the impeaching information contained in the tape and elsewhere" (Pet. 8; emphasis omitted)—deprived him of his Fifth Amendment right to due process and his Sixth Amendment right of confrontation. The contention fails at the threshold.

To prevail on his Rule 33 motion for a new trial on the basis of newly discovered evidence, petitioner was required to show not only that he discovered the evidence after trial but also that he could not, in the exercise of due diligence, have discovered it until then. See *United States ex rel. Regina* v. *LaVallee*, 504 F. 2d 580, 583–584 (C.A. 2), certiorari denied, 420 U.S. 947; *United States* v. *Slutsky*, 514 F. 2d 1222, 1225 (C.A. 2); 2 Wright, *Federal Practice and Procedure, Criminal*, § 557, p. 515 (1969 ed.). Petitioner did not discover the existence of the Crimaldi tape until after his trial. But, as he recognizes in his petition, "[i]t is the impeaching information contained in the tape and elsewhere—not the tape recording itself—which is significant" (Pet. 8; emphasis omitted). Much of that information was known to petitioner before trial. The rest of it, together with the existence of the tape, could have been discovered before trial if petitioner had diligently followed up on the information he had or at trial through proper cross-examination.

The courts below found that petitioner knew Crimaldi's reputuation as a murderer and a juice loan collector (Pet. App. 14–15, 26). He could reasonably have anticipated that the prosecutors would know something about Crimaldi's criminal background, and, if he believed that additional information of that sort would be helpful to his defense, he could easily have made a specific request to the prosecutors for infor-

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mation in their possession concerning the prior criminal activity of Crimaldi.

Such a request would have flagged for the prosecutors the potential importance of the information to the defense and might have led to disclosure before or during trial of the tape or the information contained on it. Petitioner's failure to make a specific request amounts to a failure to exercise reasonable diligence and should itself defeat his motion for a new trial. A contrary conclusion would permit a defendant to establish a claim of non-disclosure and obtain a second trial by failing fully to develop a pretrial lead and then "discovering" the same evidence in the prosecutor's file after trial.

2. Even if it be assumed that petitioner met his threshold burden, he would not be entitled to a new trial. As we argue in our brief in *United States* v. *Agurs*, No. 75–491, pp. 18–33,[7] a Rule 33 motion for a new trial on the basis of newly discovered evidence should not be granted, in the absence of culpable prosecutorial misconduct, unless the new evidence would probably lead to an acquittal. Since the additional impeaching information that petitioner allegedly "discovered" after trial plainly would not warrant a new trial under that standard, he argues that a different standard should be applied.

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[7] We have sent a copy of our brief in *Agurs* to petitioner's counsel.

First, he contends (Pet. 10–11) that a new trial is required without regard to whether the additional evidence might affect the jury's verdict, because the alleged non-disclosure prevented him from conducting effective cross-examination of Crimaldi. But the case on which he relies—*Davis* v. *Alaska*, 415 U.S. 308—does not hold or imply that a new trial is automatically required, regardless of prejudice, where the defense discovers possibly impeaching information in the prosecutor's files after trial.

Davis involved a ruling by the trial court barring cross-examination by the defense concerning a prosecution witness' juvenile delinquency adjudication. There was no ruling in the present case limiting the scope of petitioner's cross-examination. Indeed, defense counsel asked Crimaldi whether he had been a juice loan enforcer and then voluntarily abandoned the line of inquiry when Crimaldi expressed reluctance to answer the question. Petitioner was not "denied the right of effective cross-examination" (*Davis* v. *Alaska*, *supra*, 415 U.S. at 318). He simply chose as a matter of trial strategy to end his cross-examination on what evidently seemed to him a favorable note.

Non-disclosure of impeaching information by a prosecutor may bear upon the nature of a defendant's cross-examination of a prosecution witness, but it has never been viewed as requiring a new trial irrespective of the likely effect on the jury's verdict. See *Giglio* v. *United States*, 405 U.S. 150, 154. The real question here is the standard by which the effect of the non-disclosure should be assessed.

Our views on that question are set forth in our brief in *Agurs,* pp. 20–33. We argue there that the only proper occasion for departing from the normal Rule 33 standard—*i.e.,* whether the new evidence is of such weight that it would probably lead to an acquittal—is when the prosecution has breached a *duty* of disclosure. Except when the evidence is so obviously exculpatory and so plainly central to the defense that the prosecutor's failure to volunteer it demonstrates active connivance in an unjustified conviction, the duty to disclose is activated only by a reasonably focused and specific defense request for information in the prosecutor's possession.

There was no such defense request here,[8] and it cannot fairly be said that the additional impeachment information concerning Crimaldi's prior criminal activity was either obviously exculpatory or central to the defense. In view of the nearly complete corroboration of Crimaldi's testimony, there was no reason to suppose that his prior criminal activity, which in any event would bear only collaterally on his credibility, would be critical evidence.

The district court thus concluded—correctly in our view—that even if the prosecutors had been fully aware of the contents of the Crimaldi tape, they would have had no "non-discretionary duty" to disclose that

[8] A general request for all exculpatory evidence in the prosecutor's files is, in our view, equivalent to no request at all, because it cannot ordinarily be expected to accomplish the purposes that the request requirement is meant to serve. See our brief in *Agurs*, p. 29, n. 16.

information "merely because it might aid in cross-examining this witness with respect to his prior criminal activities" (Pet. App. 28). Cf. *Imbler* v. *Pachtman*, No. 74–5435, decided March 2, 1976, concurring opinion of Mr. Justice White, slip op. 14–15. This is particularly so in light of the fact that Crimaldi gave no false testimony, and the defense deliberately abandoned any effort to pursue the line of inquiry. In such circumstances, the prosecution was not obliged to insist that details not sought by the defense be brought out.

It follows, on our analysis, that petitioner is not entitled to a new trial, because it cannot reasonably be said that the additional impeaching information probably would lead to an acquittal. Underlying petitioner's contentions, however, is the contrary assumption that the prosecutors breached a clear duty spontaneously to disclose the information to the defense. Indulging that assumption *arguendo*, as did the court of appeals, there is nevertheless no basis for further review, because even under the relaxed standard applicable in such circumstances—*i.e.*, whether disclosure of the impeachment information "'could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" (*Giglio* v. *United States*, 405 U.S. 150, 154, quoting from *Napue* v. *Illinois*, 360 U.S. 264, 271)—a new trial would not be required here.

The court of appeals found, on the basis of a close examination of the record (see pp. 10–11, *supra*), that disclosure of the tape and the information contained on it "would not have affected the jury's assessment

of Crimaldi's credibility" and "would not have produced a reasonable doubt in the eyes of the jury" (Pet. App. 15–16). As we understand the court's opinion, that finding amounts to a determination that the additional information could not in any reasonable likelihood have affected the jury's verdict.

Petitioner does not appear to challenge the court's determination. He argues only that the court failed, in concluding that "any error was harmless" (Pet. App. 13), to specify that the error was harmless beyond a reasonable doubt. But it seems clear to us that the court of appeals' omission of the phrase "beyond a reasonable doubt" was inconsequential. The court's findings—fully supported by its analysis of the record—satisfied the substance of the reasonable doubt standard even if the language of that standard was not fully invoked.

3. Finally, petitioner argues (Pet. 15–16) that, regardless of whether his constitutional rights were violated by the nondisclosure of impeachment information, this Court should order a new trial in the exercise of its supervisory powers because the prosecution improperly argued to the jury that Crimaldi was a reformed youthful offender who was uninvolved in recent criminal activity and because Agent Haight testified falsely concerning his knowledge of Crimaldi's background. The court of appeals thoroughly considered and correctly rejected both contentions, and neither warrants further review.

As the court ruled, the prosecutor's closing argument "was a proper response to the distortions in

[petitioner's] trial counsel's closing argument" (Pet. App. 17), in which counsel made assertions that were not "supportable by the record" or "indeed by the transcript of the May 1971 tape of Crimaldi's * * * interview" (*id.* at 18). Contrary to petitioner's claim, the prosecutor's remarks were consistent with "[t]he taped interview and [the] record" (*ibid.*).

Moreover, the court of appeals sustained the district court's finding that Agent Haight did not commit perjury (Pet. App. 16–17). Indeed, while Haight testified at the hearing on the new trial motion that portions of his trial testimony (read to him out of context) may have been in error, the transcript of his trial testimony (set forth at note 3, *supra*) suggests that any misleading impression may be attributable more properly to the inartful and temporally confusing questions asked by defense counsel than to any deliberate falsehood by the witness.[9]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Although we do not believe that this Court's decision in *Agurs* will affect

[9] Even a close reading of the transcript fails to reveal precisely what defense counsel had in mind. His questions can reasonably be understood to ask (1) whether Haight knew that Crimaldi, *during the time he worked with Haight*, was also engaged in criminal activity, and (2) whether Haight knew or had been advised, *prior to the time he met Crimaldi*, that Crimaldi was in the "juice loan" business. A negative answer to those questions would not be inconsistent with Haight's having learned, *after* he met Crimaldi, that Crimaldi had engaged in criminal activity *prior* to the time he began to work with Haight.

the disposition of this petition,[10] portions of our argument here parallel our argument in *Agurs*, and the Court may accordingly wish to defer disposition of this petition pending the decision in *Agurs*.

Respectfully submitted.

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[10] Even if the Court were to reject each of our arguments in *Agurs*, there would be no need to remand the present case for further consideration. In view of the court of appeals' findings here, the "newly discovered" evidence would not justify a new trial even under the reasonable doubt standard that petitioner says is applicable. In contrast, the court of appeals in *Agurs* found that the new evidence there was directly material to the defendant's guilt or innocence.

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ANTHONY ESPOSITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I.

The Potential Importance Of The Crimaldi Admissions Was Sufficiently "Flagged"

The government says that since the defendant knew of Crimaldi's reputation as a juice loan enforcer, his attorney's formal pre-trial request for evidence favorable to the defendant was insufficient to compel the government to disclose that its principal witness had confessed to a life of unprosecuted crimes. Otherwise, hints the Solicitor General, a clever defendant could deliberately fail to follow a lead which "might have led to disclosure" of this explosive evidence and thereby win himself a second trial by "discovering" it later. (Govt. Br. 12-13)

That argument is wrong. Non-disclosure benefited the prosecution, not the defense. No experienced defense attorney would forego the use of this kind of devastating

impeachment of the principal prosecution witness on the hope that he could "find" it later and then be afforded "a second chance." The only reason the evidence came to light at all is because, after the conclusion of the trial, the witness Crimaldi chose to divulge his sordid life story to a newspaper reporter, who then serialized it in a ten part "Portrait of a Hit Man." (N.T.Ex. 1133-1167).*

The government says that the defense should have "made a specific request to the prosecutors for information in their possession concerning the prior criminal activity of Crimaldi" and that "such a request would have flagged for the prosecution the potential importance of the information to the defense." (Govt. Br. 12-13)

There may be certain types of information for which the "flagging the potential importance" test suggested by the Solicitor General** makes sense. There is other evidence, the importance of which, by the very nature of the information itself, is obvious to the prosecution even without a defense request. We submit that a litany of confessions of unprosecuted crime by the government's star witness falls in the latter rather than the former category.***

In the present case, the potential importance of Crimaldi's admissions could not have escaped the notice of the prosecution. In fact, the prosecutor who tried the case was briefed by the BNDD agents concerning Crimaldi's admissions *for the express purpose* of being advised of facts

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* "Tr. ....." refers to the transcript of Esposito's trial; "H. ....." refers to the May 21-22, 1974 hearings on Esposito's Motion For New Trial. "N.T.Ex. . . ." refers to the Exhibit to Motion for New Trial.

** Such a test is suggested by the government both in this case and in its brief in *United States* v. *Agurs*, No. 75-491, at p. 29.

*** Confessions of unprosecuted crime by prosecution witnesses, as well as records of their criminal convictions, ought be made available as a matter of routine in federal criminal cases.

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which might be brought out on Crimaldi's direct or cross-examination (H. 71, 76-79).* The defense attorney's questioning of Crimaldi, and of Agent Haight concerning Crimaldi, could leave no doubt in any listener's mind that he considered Crimaldi's other criminality and possible motivation to aid the prosecution as important. (Tr. 105-107, 174-176)

We think it is significant that in the hearing on the motion for new trial, the prosecutor offered *no explanation* for his failure to disclose the Crimaldi admissions to Esposito's trial counsel. Nor did he deny the agents' testimony that he had been briefed concerning Crimaldi's admissions immediately prior to trial.

II.

The Reasons For Granting Certiorari In Agurs Apply More Forcefully Here

The government concedes that its argument in the instant case parallels its argument in *United States* v. *Agurs*, No. 75-491, and suggests that the Court may wish to defer disposition of the *Esposito* petition pending its decision in *Agurs*. (Govt. Br. 13, 18-19)

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* The testimony of Agent Braseth at the hearing on the motion for new trial concerning the purpose of his briefing of the prosecutor as to Crimaldi's admissions is as follows (H. 78-79):

"THE COURT: Was the purpose of those particular conversations to advise the Government as to what kind of a witness they would have on their hands?

"THE WITNESS: Yes, sir, that is part of it.

"THE COURT: And to perhaps apprise them of what might come out on cross examination or what they might want to bring out on direct?

"THE WITNESS: Yes, sir.

"THE COURT: That was the general purpose of giving information other than the Esposito information?

"THE WITNESS: That is correct."

We agree that the cases are similar. The principal difference is that in *Esposito* there is even more reason for the intervention of this Court than is true in *Agurs*.

In *Agurs*, both prosecutor and defense counsel shared the belief that the undisclosed information was not admissible. (Govt. brief in *Agurs* at p. 6) This was not the case in *Esposito*, in which defense counsel was not aware of the information.

In *Agurs*, the defense made no pretrial request for production of exculpatory information. (Govt. brief in *Agurs* at p. 5 n. 2.) In *Esposito*, the defense made the request, but the prosecution failed to honor it.

In *Agurs*, the defense attorney had been put on notice that the decedent probably had a criminal record but did not request that it be produced. (Govt. brief in *Agurs* at pp. 4-5.) Whatever defense counsel in *Esposito* may have heard concerning Crimaldi's reputation, he had no way of knowing that Crimaldi had confessed to a large number of crimes for which he was not prosecuted.

We submit, in short, that none of the excuses offered by the government for its non-disclosure in *Agurs* (Govt. brief in *Agurs* at p. 32) can justify its stoney silence in *Esposito* with respect to the Crimaldi impeachment.

III.

The Prosecution Took Advantage Of The Non-Disclosure

As we point out in our Petition (pp. 15-16), the prosecution in *Esposito*, unlike *Agurs*, exacerbated its non-disclosure concerning Crimaldi by permitting its witness Agent Haight to falsely deny his knowledge of Crimaldi's juice loan activities and by arguing to the jury that Crimaldi was a reformed youthful criminal with no motive to lie.

The government, in its response (Govt. Br. 18), makes a feeble attempt to rehabilitate Agent Haight (despite his own later admission that his trial testimony was in error), by parsing the questions and his answers and by attempting to show that the answers may have been literally true. Bearing in mind that Agent Haight was the very person who had conducted a debriefing of Crimaldi on his juice loan activities and immediately before the Esposito trial had listened to the Crimaldi tape recording (H. 113-120; H. Ex. 1L-1N), the Court can draw its own conclusions as to whether Agent Haight's testimony* was candid; the prosecutor sat silently through that testimony, making no effort to correct it.

Conclusion

For the reasons set forth in our initial petition as well as those relied on by the Court in granting certiorari in the *Agurs* case, we respectfully urge that this Court grant certiorari to review the judgment of the Seventh Circuit in this case.

Respectfully submitted,

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* Set forth in the footnote on page 3 of Respondent's brief herein.